

# EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

PECO PALLET, INC.,

Plaintiff,

-vs-

NORTHWEST PALLET SUPPLY CO.,

Defendants.

No. 15 C 6811

Chicago, Illinois

May 10, 2016

10:30 a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE ANDREA R. WOOD

APPEARANCES:

For the Plaintiff:

WINSTON & STRAWN LLP

35 West Wacker Drive

Chicago, Illinois 60601

BY: MR. DANIEL D. RUBINSTEIN

MS. KATHRYN A. BAYER

MR. WILLIAM CHARLES O'NEIL

For the Defendant:

TARPEY WIX LLC

225 West Wacker Drive

Chicago, Illinois 60606

BY: MR. DAVID G. WIX

COLETTE M. KUEMMETH, CSR, RMR, FCRR

OFFICIAL COURT REPORTER

219 South Dearborn Street

Room 1928

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1 passed.

2 THE COURT: Okay. So Mr. Wix, did Allen County  
3 indicate that they were going to file something, seek a  
4 protective order, something along those lines?

5 MR. WIX: I had a voicemail this morning, your  
6 Honor, I didn't have time to call them back. The voicemail  
7 was that they wanted to -- they were aware of the fact that  
8 we had filed a motion to quash and that they wanted to be a  
9 part of that because they considered the documents being  
10 requested in the subpoena to be confidential and proprietary  
11 to them. But I haven't had that actual conversation.

12 THE COURT: Okay. Well, obviously I can't rule on  
13 any objection that they don't actually come in and raise. So  
14 on the issue of at least PECO's subpoenas, I don't at this  
15 point have any record of any objection from a party, or at  
16 least that's gotten to the level where they're seeking a  
17 protective order.

18 I did have some of my own concerns about the scope  
19 of the subpoenas. I don't recall if I touched on this last  
20 time before we ended up continuing things to this hearing.  
21 But the subpoenas, as I recall, requesting documents relating  
22 to the third parties' relationships with other recyclers  
23 other than Northwest, I think it was generally about any such  
24 arrangements that they had in place. Let me see if I can  
25 pull up my note. But that was my recollection.

1           Is that what PECO is seeking here, or is your  
2 request intended to be just limited to the third parties'  
3 business relationships with either PECO or Northwest?

4           MR. O'NEIL: We are limiting it to the latter.  
5 Their business relationship with us or them. We're only  
6 concerned with what these parties have done with our pallets  
7 when they have come into possession with our pallets, how  
8 much cost they are incurring to handle them, to stack, sort,  
9 and load them, and how much -- what the economics are like  
10 vis-à-vis them and Northwest.

11           This is very important to our damages, the damages  
12 for both sides in this case. The central issue is these two  
13 parties can't agree on what a fair price is to do the work,  
14 the effort that they do when they get our pallets. And these  
15 are the subcontractors that they've hired around the country.  
16 This is a sampling of the subcontractors that handle our  
17 pallets.

18           So Northwest has national contracts, with Target as  
19 one example, but they don't have employees around the country  
20 to handle those pallets themselves, so they have to  
21 subcontract that work to other pallet recyclers throughout  
22 the country. These are 11 pallet recyclers which they've  
23 identified in their own Rule 26(a) disclosures as people  
24 having knowledge about the case. So we've asked their  
25 subcontractors: To the extent you come into contact with

1 PECO pallets, tell us about your correspondence with  
2 Northwest about it and what the economics are of how much are  
3 they paying you to do the stack, sort, and load, because  
4 that's central to figuring out the key issue in this case,  
5 which is what's the right price. Because that's really what  
6 this case is largely coming down to, and what the parties  
7 fundamentally, if you set aside all the causes of action,  
8 can't agree on.

9 THE COURT: Am I correct, though, that the subpoena  
10 would call for production of information relating to any  
11 arrangement they have with a business partner other than  
12 Northwest to recycle PECO pallets?

13 MR. O'NEIL: That's not our intention, your Honor,  
14 and we're glad to -- I mean, we've made it clear to these  
15 folks we're glad to work with them to narrow the burden.  
16 We've issued seven requests. We are not trying to unfairly  
17 burden these people or get into their business affairs. We  
18 really want to know issues related to their business  
19 relationship with Northwest and specifically their handling  
20 of these red PECO pallets. Anything else they do we're not  
21 concerned with getting into. So we will gladly constrict the  
22 subpoena to those confines with these third parties.

23 THE COURT: Give me a moment here.

24 So I think the subpoena that was attached to the  
25 motion to quash is directed to the Pallet Factory?

1 MR. O'NEIL: In fact, I have that one in my hand,  
2 your Honor.

3 THE COURT: Okay. So --

4 MR. WIX: I believe they're all the same.

5 MR. O'NEIL: They are all the same.

6 THE COURT: They're all the same. Good. That  
7 makes it simpler.

8 So for example, item No. 4 says: "All documents  
9 and communications relating to any fees Pallet Factory may  
10 have paid to Northwest, any retailer, or any other party as  
11 it relates to PECO pallets."

12 So I guess my question is for these requests that  
13 refer to any retailer or any other parties, is that intended  
14 to capture if they had a relationship with somebody other  
15 than Northwest or performed the same services, are you asking  
16 them to provide that information, or only with Northwest?

17 MR. O'NEIL: Northwest. And the retailer is not  
18 Northwest. The retailer is Target, in my hypothetical  
19 example. Because what we've learned in this case or have  
20 been told by Northwest is that they're sometimes paying  
21 concession fees to get our pallets. So to get our red  
22 pallets they're paying -- I'll give you 10 cents, 20 cents in  
23 issue to get the pallet, and then they're doing their labor  
24 on top of it.

25 So part of their damages they're claiming in this

1 case is not just the actual effort of stack, sort, and load  
2 our pallet, but also this concession fee they're basically  
3 paying to buy our property and get the opportunity to handle  
4 it and sell it -- in their mind sell it back to us, in our  
5 mind return our property to us.

6 So part of their damages is that concession fee,  
7 and so we're trying to get to the financial economics of if  
8 that subcontractor is paying concession to Target to get  
9 their hands on the red pallets in the first place, we want to  
10 make sure we know what that is so that we can fairly account  
11 for that in our damage model if we need to.

12 THE COURT: So the Pallet Factory here is the  
13 subcontractor then that is contracting with Northwest to  
14 collect pallets from the retailers, and then the pallets go  
15 to Northwest, and Northwest ideally would be returning them  
16 to PECO at some amount of money, and that's what you're  
17 fighting about?

18 MR. O'NEIL: That pretty fairly represents it. So  
19 Northwest goes out, and I'll let Mr. Wix comment to his -- to  
20 his client's relationship. As I understand it, they go out  
21 and sign a national contract with Target and say, we'll  
22 handle all your distribution centers, pallets that come to  
23 those distribution centers. But they don't have the manpower  
24 to service that themselves on a nation-wide basis. They  
25 subcontract it out.

1           The Pallet Factory is one of those subcontractor  
2 vendors with them that come into contact with our pallets.  
3 So there is some revenue share between Northwest and the  
4 Pallet Factory as to there is an economic arrangement there  
5 as to how much they're getting paid and how much Target is  
6 getting paid for this whole thing, and we just want  
7 transparency as to what that economic arrangement is for all  
8 three of those parties so that we can build a damages model  
9 that fairly accounts for the effort.

10           THE COURT: Would the Pallet Factory also work as a  
11 subcontractor for some other companies, and would they also  
12 do their own work on their own, collect pallets for their own  
13 benefit not because they have a contract relationship with  
14 Northwest?

15           MR. WIX: That's certainly my understanding, is  
16 these independent contractors that Northwest Pallet enters  
17 into agreements with are not solely doing the work just for  
18 Northwest Pallet. They have their own businesses. I don't  
19 know, they may very well have other arrangements with other  
20 pallet recyclers to clear their docks in a certain particular  
21 area, I don't know about that, but they certainly -- my  
22 understanding is I don't think any of these recyclers have  
23 100 percent of their business, which is independent  
24 contracting and the work that they've agreed to do for  
25 Northwest Pallet.



1           So I think, your Honor, part of our motion is that  
2 these requests go way beyond anything that even arguably  
3 could be related to Northwest Pallet, because it's asking for  
4 any PECO Pallet or any arrangement that they have with any  
5 retailer that, in our view, goes above and beyond what the  
6 case is about.

7           And then quite frankly, as pointed out in our  
8 motion, PECO's damages in this case relate to conversion, and  
9 so everything that Mr. O'Neil is talking about about the  
10 pricing relationship between Northwest Pallet and companies  
11 like Pallet Recycler have nothing to do with whether  
12 Northwest Pallet converted any pallets.

13           THE COURT: What about Northwest's claims in the  
14 other suit?

15           MR. WIX: Our claim is for unjust enrichment, which  
16 the measurement of damages which is the value of the pallet  
17 returned to PECO, not any of the costs associated with  
18 Northwest Pallet in getting that pallet back to PECO. The  
19 measure of unjust enrichment damages is the value conferred  
20 on the recipient of that service. So in this case it would  
21 be what is the value of having a pallet that is otherwise not  
22 in your possession and, in our opinion, lost or abandoned in  
23 the marketplace returned to you so that you can then use it,  
24 and rent it multiple times over the course of that pallet's  
25 life. And those are the issues and the information that we

1 need to get in order to proceed with our claim of unjust  
2 enrichment, is what the value is to them. Not what it might  
3 cost us to get it back to them.

4 THE COURT: Also for I guess the promissory  
5 estoppel claim or some of the other claims, isn't part of  
6 your damages model dependent on coming up with a fair  
7 compensation for your services? I understand you think the  
8 fair compensation is what's in the agreement that sets out,  
9 you know, what they had agreed to pay, but isn't there an  
10 argument to be made that you need to figure out what it  
11 really is in order to get to your damages for your claims?

12 MR. WIX: I don't believe so, because our  
13 promissory estoppel claims are based upon the promises made  
14 by PECO, PECO, to pay us a certain --

15 THE COURT: Is it peak-oh or peck-oh, by the way?

16 MR. WIX: We say peak-oh in our office, but I hear  
17 them say peck-oh.

18 MR. O'NEIL: Phonetically it's P-A-Y-C-O.

19 MR. WIX: PECO, I apologize.

20 THE COURT: I was saying peak-oh, and I heard  
21 peck-oh, so I switched.

22 MR. WIX: Our promissory estoppel claims are based  
23 upon the promises that they made to us of a certain amount  
24 that they would pay for the return of pallets. So for  
25 instance, from January of 2015 until May 12, 2015 when PECO

1 sent us the letter saying we're no longer going to pay you,  
2 they had previously promised to pay anywhere from \$1.25 or  
3 \$1.95 per pallet, depending upon where it came from, for the  
4 return of those pallets.

5 And during those three months -- four, four and a  
6 half months, Northwest Pallet returned a number of pallets.  
7 So part of our promissory estoppel claim is we're entitled to  
8 the amount you promised us, because based upon that promise  
9 we went out and gathered those pallets and returned them to  
10 you.

11 So the only thing that we need to determine is  
12 whether we acted reasonably on reliance on their promise for  
13 a certain amount. We don't need any information from anybody  
14 else to determine what that amount should be. The amount is  
15 based on what they unequivocally promised to pay us to do  
16 that for.

17 THE COURT: So your unjust enrichment claim you're  
18 saying similarly doesn't require any independent assessment  
19 of the value of the service of returning the pallets?

20 MR. WIX: Well, our position is the value of the  
21 benefit conferred on PECO. So what the value of having a  
22 pallet returned to them is to them.

23 Now, our position on that is what it actually costs  
24 us to get the pallets back to them is not necessarily  
25 indicative of what the value is to them. If it only costs us

1 hypothetically ten cents a pallet to get it back to them, but  
2 they're going to re-rent that pallet for \$5.25, and they're  
3 going to do that multiple times per year, the value to them  
4 of having that pallet back is far greater than what our cost  
5 is. And that is what the measure of unjust enrichment is,  
6 the damages under an unjust enrichment theory is the value  
7 conferred on the recipient. So our position is that that's  
8 the kind of information that we need to be uncovering in  
9 discovery versus what our actual costs are in doing it.

10 MR. O'NEIL: Your Honor, we strongly disagree that  
11 that's the right measure of damages and that's the right  
12 legal theory under which to measure the damages.

13 THE COURT: Under their case or your case?

14 MR. O'NEIL: Under their case and our case. So we  
15 have a bailment claim. And under bailment law, the theory of  
16 damages is the exact opposite of what Mr. Wix articulated,  
17 and it is the actual cost of the services that have been  
18 provided, not the value conferred upon us. So we think  
19 that's the right measure of damages, and what I think you've  
20 seen here is a preview of what is probably coming in  
21 competing expert reports about different theories. But we're  
22 in discovery, and what Mr. Wix would like to do is prevent me  
23 from getting discovery about my theory of damages in this  
24 case and the appropriate measure of damages so I can't even  
25 put in that measure in a report in the case.

1           So if you think about it in a very simple  
2 hypothetical as Northwest Pallet being a tow truck driver,  
3 and they're towing a BMW. The BMW costs \$50,000. Under his  
4 theory of damages the fee for the tow job would be well, the  
5 car is worth 50,000 to you, so my fee can be 50,000. That's  
6 his theory. And my theory is it costs \$185 for a tow truck  
7 job across the street, and that's the right measure of  
8 damages for that effort. That is really a point of  
9 divergence intellectually and legally between these parties,  
10 but at the discovery stage we should be entitled to take  
11 discovery on the basic factual underpinnings of our competing  
12 theories of damages, and we can present these to the Court  
13 and maybe there will be motions in limine at some other  
14 stage, but this at the discovery stage is not the right point  
15 in time I think for us to say that you can't even have  
16 discovery related to your theory of damages in the case that  
17 is sound under the case law.

18           THE COURT: So I am going to permit some third  
19 party discovery on these issues, and what I'm trying to  
20 establish is perhaps some sort of limit or outer boundary to  
21 the scope of that discovery.

22           It does seem to me that Northwest would have  
23 standing to object to the subpoena based on the fact that  
24 these are going to the heart of its business relationship  
25 with third parties which could potentially damage those third

1 parties and therefore there is a direct interest that  
2 Northwest is seeking to protect. That said, this information  
3 strikes me as highly probative to some extent to the  
4 substance of the case.

5 So while I think Northwest has standing to move to  
6 quash the subpoena, I'm not going to quash the subpoena. And  
7 what I'm struggling with a little bit, and I'll ask the  
8 parties to provide input on, is to the extent I'm concerned  
9 about the third parties having to disclose information about  
10 business practices and relationships that do not have to do  
11 with Northwest's arrangement for collecting pallets,  
12 including PECO pallets, and then returning those to PECO,  
13 does that go beyond the scope of what should be permitted, is  
14 that something that potentially is invasive of proprietary  
15 interests of those third parties because it's getting into  
16 separate business relationships.

17 And then second, even if that's the case, those  
18 third parties aren't here objecting. So while I do think  
19 Northwest has standing to be concerned about its own business  
20 relationships with these third parties, if the third parties  
21 aren't complaining about this stuff off to the side that's  
22 not directly related to Northwest, maybe that's not of  
23 sufficient interest for Northwest to be objecting to it.

24 So let me start by, I guess, asking on the PECO  
25 side: First, are you confirming that you do, in fact, want

1 information from these subcontractors about their  
2 arrangements to the extent they involve PECO pallets, even if  
3 Northwest is not a party to the arrangement?

4 MR. O'NEIL: So I think it is relevant to the  
5 damages in terms of what their fee is to do that work, that  
6 --

7 THE COURT: You want to know what the market rate  
8 is.

9 MR. O'NEIL: I want to know what the market rate  
10 is. But I would be willing to get at that information in a  
11 very narrow tailored way that is not burdensome to these  
12 third parties. Like I don't have to get into email  
13 correspondence between them and another partner beside  
14 Northwest, I would just need a sort of report, documents  
15 sufficient to show rather than all documents related to the  
16 subject. If they could just give us a report saying here's  
17 what the economics of the labor looks like for this in a  
18 spreadsheet, it could be perhaps as narrow as one document.

19 We're not seeking to get into the inner workings or  
20 the interplay of the communications in their business  
21 relationship with anyone else. We just want to know what the  
22 market looks like for the stack, sort, and load effort.

23 THE COURT: Are you planning to issue 30(b)(6)  
24 notices to any of these subcontractors?

25 MR. O'NEIL: We may have to, but I hope not to. I

1 think we're going to start with the first party discovery and  
2 see what information we can get. We may do a 30(b)(6) to  
3 Northwest Pallet, and we would only do that if we felt like  
4 we needed to, and we would not do it in a blanket fashion to  
5 all eleven of these people. We would try to be strategic  
6 based on document production and maybe do one and see if we  
7 need to do any more. But that's not our intention with doing  
8 this, is to invoke a significant number of third-party  
9 discovery.

10 We've sent these eleven folks a letter after we saw  
11 you last that said, you know, Judge Wood is holding a hearing  
12 on the 10th, if you want to object here's the address, please  
13 come, and you have an opportunity to be heard.

14 We can send them another letter today clarifying  
15 what we're seeking for in this consistent with the Court's  
16 direction and concern on this particular issue. We can  
17 basically offer to constrain the boundaries of what we're  
18 looking for in a more narrow way in light of the Court's  
19 guidance, and we can do that and get that to them via Federal  
20 Express right away.

21 THE COURT: Well, I think the issue is what you're  
22 asking them to do, which is to create a spreadsheet that  
23 summarizes all of this information. I'm not sure that there  
24 is a good mechanism under the federal rules for them to have  
25 to do that, except for having to sit for a deposition.



1 Because for a document request, they could certainly object  
2 to having to create a document.

3 MR. O'NEIL: I should be clear. I was asking for a  
4 report that could be run in the ordinary course of the  
5 business or that exists in the ordinary course of the  
6 business, not that they create some new document that's never  
7 before existed. But if they have -- maybe it's just a  
8 financial statement, a quarterly financial statement that has  
9 that information; they can redact the other things. We would  
10 work with them to try to get that one piece that is not  
11 related to Northwest.

12 And I don't think it's that -- I think we may be  
13 concerned about something that's not -- a non-issue. I don't  
14 think these recyclers are working with other parties to  
15 handle PECO pallets, because PECO would be pretty cognizant  
16 of that I think if these people were getting their hands on  
17 their pallets through some other stream of commerce. I think  
18 we would already kind of know about that. So I think the  
19 concern is well-founded, but I think factually may not be  
20 very prevalent.

21 THE COURT: Mr. Wix, let's assume that I'm going to  
22 allow discovery relating to the subcontractors' relationship  
23 with Northwest and the collection of those pallets and what  
24 that arrangement is. Should I be concerned about the more  
25 expansive category that I just described?

1 MR. WIX: Well, I think so, for largely the same  
2 point that we've raised before, because at the end of the day  
3 these pallet recyclers, just like Northwest Pallet, is a  
4 competitor of PECO Pallet. They're renting pallets out in  
5 the marketplace, pallet recyclers are getting white wood  
6 pallets, repairing them, recycling them, and selling them out  
7 in the marketplace, too, and they're both competing for the  
8 same business with manufacturers, and producers, and anybody  
9 who is shipping product for the business to use their  
10 pallets.

11 So for them to -- it's one thing -- I won't belabor  
12 the point on why I don't think it's relevant to damages  
13 because you've ruled on that -- but it's one thing to say all  
14 right, I'm going to allow PECO to get information related to  
15 Northwest, which we can, you know, mark as confidential, or  
16 attorneys' eyes only under the protective order, it's another  
17 thing to then go to these third parties and say we don't --  
18 we not only want your information on how you do business with  
19 Northwest Pallet, we want all your information on how you do  
20 business, when they are, in fact, at the end of the day  
21 competitors in the same business of supplying pallets to  
22 entities that ship product. So I think there is a concern  
23 that the Court should be cognizant of.

24 THE COURT: And is PECO actually seeking all  
25 communications between Northwest and subcontractors about the

1 arrangements, or are you actually expecting the  
2 subcontractors to run email searches to try to get every  
3 email back and forth?

4 I don't know if this is an industry where there is  
5 a lot of email traffic about these arrangements or if you  
6 sign an agreement, enter into an arrangement, and then it's  
7 sort of self-effectuating, you don't need to correspond very  
8 much.

9 MR. O'NEIL: So from the few people we have heard  
10 from that have contacted us, they have said they have none or  
11 almost no emails. So I don't think this is a heavy email  
12 thing. If a particular -- one of these respondents came and  
13 said look, that's very burdensome, we have a lot of emails, I  
14 think we would limit the search terms to perhaps Northwest  
15 Pallet, or NWP, or the ampersand Northwest Pallet.Com email  
16 post fix, or something like that.

17 Again, we are not -- we envision the document  
18 productions from these eleven people to be thin. I'm not  
19 expecting to see more than 500 pages or a thousand pages from  
20 these people. If someone came and said look, I've got a  
21 hundred thousand pages, we would gladly work with them to  
22 narrow the universe down. I do not think these are  
23 significantly large productions that we're asking for.

24 THE COURT: Are you expecting to see a written  
25 contract that breaks down the compensation that's going to go

1 to the subcontractor versus the compensation that's going to  
2 Northwest?

3 MR. O'NEIL: I am expecting to see that, and that's  
4 something that we've asked for from Northwest. And we have a  
5 motion to compel that maybe we'll get to later today, but  
6 that's a piece of that as well. But that's something we  
7 would like, whether it's from the third party or from  
8 Northwest. But there is a business arrangement that should  
9 specify the economics, we believe, and we would like that  
10 document.

11 THE COURT: Okay. So one more question about the  
12 scope of PECO's subpoena. I think it goes back to January of  
13 2013. That I think -- let's see. When did the Asset  
14 Recovery Program come into effect?

15 MR. O'NEIL: That's been going for many years. We  
16 used January of 2013 because that's the date that we agreed  
17 to with Northwest for both directions on our ESI protocol.

18 THE COURT: I see. So it's to be consistent with  
19 other discovery in the case?

20 MR. O'NEIL: Yes.

21 MR. WIX: Although I would -- sorry to interrupt --  
22 I would point out there are different categories of documents  
23 where we have agreed to a not lengthy -- not as lengthy a  
24 time period. There are some categories where we've agreed we  
25 only need to go back to January 1st, 2015, for instance.

1           And I would point out that the initial motion to  
2       quash of the first two subpoenas that PECO filed back in  
3       November and then we filed a motion to quash those in  
4       December, those subpoenas only went back to January 1, 2014.  
5       So while I agree with Mr. O'Neil that that was a time  
6       parameter that was part of our ESI protocol, it certainly  
7       isn't written in stone based upon what we've done in this  
8       case.

9           MR. O'NEIL: Again, we would be flexible. If one  
10      of these eleven people called us up and said look, we think  
11      that's a lot of information, can we constrict the time  
12      period, we would say of course, we'll work with you.

13           We believe that's the relevant time period, but if  
14      -- we would prefer to resolve this amicably without taking  
15      the Court's time. And if we had to take some time off for  
16      that with a particular recycler because they had a lot of  
17      volume, we would gladly do that.

18           THE COURT: Okay. For the contracts, assuming they  
19      exist, that show the breakdown in the compensation, is that  
20      something that Northwest would be seeking to designate as  
21      attorneys' eyes only because you wouldn't want the business  
22      people at PECO to know the exact breakdown?

23           MR. WIX: Correct.

24           MR. O'NEIL: And we have no issue with that, your  
25      Honor.

1 THE COURT: Okay. So again, based on not having  
2 any motion for protective order that's been presented by any  
3 of the third parties, and just on the briefing that PECO and  
4 Northwest have submitted on the motion to quash and our  
5 argument in court, I'm inclined to deny the motion to quash  
6 but impose some restrictions with respect to the third-party  
7 productions just to make it a little more manageable, a  
8 little less invasive to the third parties, and a little more  
9 clearly relevant and probative so that the third parties --  
10 so that PECO may seek from the third parties generally the  
11 documents that are called for by the subpoena as they relate  
12 to the third parties' relationship with Northwest to collect,  
13 store, or return the PECO pallets, and those materials should  
14 be provided to Northwest so they have an opportunity to  
15 determine whether they should be designated as confidential  
16 or attorneys' eyes only subject to the protective order.

17 Are the third parties being given an opportunity as  
18 well to designate under the protective order?

19 MR. O'NEIL: That would be available to them under  
20 the protective order.

21 MR. WIX: I know one of -- Mobile Pallet I think  
22 responded and marked everything attorneys' eyes only. So I  
23 know they were all provided with a copy of the protective  
24 order when the subpoena was served, as were all of the  
25 recipients of the subpoenas that were issued by Northwest

1 Pallet.

2 I don't know -- again, I can't speak for  
3 Mr. O'Neil -- I know one of the pallet recyclers who I think  
4 might have responded, I don't remember which one, but  
5 certainly raised an issue whether the protective order in  
6 this case truly applies to the third parties since they  
7 aren't a party to the protective order. Oh, actually, you  
8 know what? That was one of the recipients of our subpoenas  
9 who was making that objection to me, and I think we're going  
10 to work it out, but I just raise that.

11 THE COURT: I would think the parties could work  
12 out an addendum to the protective order to make it clear and  
13 give comfort to third parties that they would have ability to  
14 designate under the order as well.

15 MR. WIX: Right. And that's what I discussed with  
16 the attorney for one of the recipients of our subpoenas.

17 THE COURT: So for the documents, I'll say  
18 information that would go beyond the subcontractors'  
19 relationship with Northwest to whatever activities they might  
20 be doing on their own or with other business partners, how  
21 would you propose to limit the description? Documents  
22 sufficient to show what? What is the spreadsheet that you  
23 think can be created in the ordinary course?

24 MR. O'NEIL: Sure. Let me take a shot at trying to  
25 narrow it down. Documents sufficient to show your cost to

1 stack, sort, and load PECO pallets, and the amount which you  
2 charge to stack, sort, and load PECO pallets.

3 THE COURT: Do you expect that there will be other  
4 subcontractors or third parties from which you'll be seeking  
5 this information?

6 MR. O'NEIL: I don't think so. We tried to pick a  
7 list of these eleven folks based on the discovery we saw from  
8 Northwest Pallet, and we don't intend at this point to serve  
9 any more third-party subpoenas on any of their other  
10 recycling partners or subcontractors.

11 THE COURT: Mr. Wix, would you concur that this  
12 sort of spreadsheet or report is something that the third  
13 parties should be able to generate in the ordinary course of  
14 their business? Would you expect that?

15 MR. WIX: That I don't know, your Honor.

16 THE COURT: Would Northwest be able to do it?

17 MR. WIX: I would think that they may be able to  
18 show something that what their present costs and/or charges  
19 are; to the extent going back to 2013, I don't know. But,  
20 you know, I would think, yeah, Northwest Pallet would be able  
21 to, I believe -- well, there is a lot of different factors  
22 that go into it, and I don't know whether these recyclers  
23 necessarily put all of it together to determine what the true  
24 cost really is of stacking, sorting, and loading a pallet in  
25 terms of transportation, mileage, gas, labor, worker's comp,



1 all those different categories which they may have individual  
2 knowledge of, whether they put it all together, not to  
3 mention -- well, this gets into damages theories that I'm  
4 sure you'll hear a lot about with the experts, but the whole  
5 idea of the lost cost opportunity to the pallet recyclers by  
6 having to have space in their trailers taken up by PECO  
7 pallets versus white wood pallets, which is where they're  
8 really making their living and earning their income.

9 But to answer your question, I would think so. I  
10 just don't know the extent.

11 THE COURT: You say the third parties are really  
12 making their income from the white wood pallets and not the  
13 PECO pallets? PECO pallets?

14 MR. WIX: I think that the pallet recyclers at the  
15 core of their business is the recycling and resale of white  
16 wood pallets. Obviously I don't know what their  
17 relationships are outside of Northwest Pallet, so maybe they  
18 have different relationships with respect to this stacking,  
19 sorting, collecting, and transportation of PECO pallets from  
20 other sources that is making them a lot of money and it's a  
21 more significant part of their revenue than I'm aware of. So  
22 I suppose I should retract that statement a little bit  
23 because I don't know the extent of what their relationship is  
24 with other people beyond Northwest Pallet as it pertains to  
25 the collection and return of PECO pallets.

1           THE COURT: Okay. So is -- at least for present  
2 purposes is Northwest comfortable then with the limitation  
3 for third parties that they can satisfy the subpoena by --  
4 with respect to the non-Northwest-related arrangements with  
5 documents sufficient to show the cost to stack, sort, and  
6 load PECO pallets and the amount that they charge to stack,  
7 sort, and load PECO pallets?

8           MR. WIX: You said Northwest --

9           THE COURT: I'm sorry. PECO.

10          MR. O'NEIL: We're fine with that limitation of  
11 documents sufficient to show, and to the extent they don't  
12 have such documents, then they obviously can't produce those  
13 to us and maybe we'll have to take a deposition in that  
14 instance. But I don't know whether they track this, but if  
15 they do, I would think most businesses track whether they're  
16 profitable, what their costs are and what their profit margin  
17 is, but if for some reason they don't, they can tell us that,  
18 and we'll work with them to find some other solution and  
19 we'll move on.

20          THE COURT: I assume that Northwest would maintain  
21 your objection even to that more narrowly-drawn category of  
22 documents, you would still be seeking to quash those  
23 categories?

24          MR. WIX: We would.

25          THE COURT: Fair enough. So I'm inclined to allow

1 the subpoena to stand with that restriction that the third  
2 parties will be able to satisfy the non-Northwest portion of  
3 the production as I just described on the record, and again,  
4 my position at this point is based in part on the fact that I  
5 haven't heard from any third party coming in saying wait a  
6 minute, this is burdensome, or it's getting into my other  
7 business relationships, and it's a problem and it's an issue  
8 for me.

9           If there is a third party that wants to raise it, I  
10 would say this ruling, which is on Northwest's motion to  
11 quash, would be without prejudice to those third parties  
12 coming in and making an objection. It's possible that they  
13 might have waived it at this point if their time for  
14 objecting is passed or whatever the situation is, but knowing  
15 that certain of these third parties have been in  
16 communications with PECO, and maybe Northwest as well, I  
17 think I'm going to leave the door open for them to at least  
18 make an argument even if ultimately I find it's untimely,  
19 because to me there is some difference between Northwest,  
20 which is not just a defendant in this overall litigation but  
21 also a plaintiff, and so to some extent Northwest is also  
22 responsible for the fact that there is -- to some extent,  
23 that there is going to be discovery on the issue of how this  
24 industry is working and functioning and how costs are  
25 allocated. So I think an objection from a third party would

1 carry more weight with me with respect to the scope of the  
2 subpoena, the burdensomeness of it at this point.

3 So Mr. Wix, I did give you some limitation, so you  
4 can feel you got something for your client and its business  
5 partners.

6 My expectation is that a lot of the actual detailed  
7 cost information would be appropriate for at least  
8 confidential designation and probably attorneys' eyes only if  
9 there are details of the business relationship that, you  
10 know, perhaps could be used by business people at PECO, for  
11 example, in the future and their pricing models.

12 I take it there have been -- there are no efforts  
13 by PECO to quash Northwest's subpoenas, and I haven't seen  
14 any protective order come in from third parties to Northwest  
15 subpoenas, so there is nothing for me to decide on that.

16 MR. O'NEIL: That's correct, your Honor.

17 MR. WIX: There is nothing to decide, your Honor.  
18 I think we're in the same boat, that there's a couple we  
19 haven't heard from, so perhaps there might be a motion to  
20 compel at some point, but not at the moment.

21 THE COURT: Good. So let's talk about the motion  
22 to compel that was filed previously. Have the parties made  
23 any progress on your own in trying to get information  
24 exchanged?

25 MR. O'NEIL: I think we made some progress, your